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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re) Case No. 05-04824-B7
) Adv. No. 05-90358-B7
ALFREDO DINUNZIO and)
ROSANA DINUNZIO,) ORDER ON MOTION FOR
) SUMMARY JUDGMENT
Debtors.)
_____)
)
CREATIVE CAPITAL LEASING)
GROUP, LLC a California)
limited liability company,)
)
Movant,)
)
v.)
)
ALFREDO DINUNZIO and)
ROSANA DINUNZIO,)
)
Respondents.)
)

Creative Capital Leasing Group, LLC, (Plaintiff) seeks summary judgment that its claim against the Debtors is nondischargeable based upon a settlement agreement in a prior bankruptcy case which so provided. Debtors seek damages based upon Plaintiff's alleged violation of the automatic stay in the

1 present case. For the reasons set forth below, Plaintiff's
2 motion is granted in part. Debtors' request for sanctions is
3 denied.

4 This Court has subject matter jurisdiction over the
5 proceeding pursuant to 28 U.S.C. § 1334 and General Order
6 No. 312-D of the United States District Court for the Southern
7 District of California. This is a core proceeding under
8 28 U.S.C. § 157(b)(2)(A) & (I).

9 **FACTS**

10 This is Debtors' second bankruptcy case. Debtors' first
11 case was filed as a chapter 11 on February 25, 1997, Case No.
12 97-2797 (Prior Case). In the Prior Case Plaintiff filed its
13 "Complaint to Determine Dischargeability of Debt," commencing
14 Adversary Proceeding No. 97-90390. A few years later, the
15 parties entered into a settlement agreement (Settlement
16 Agreement) which the Court approved on June 21, 2001 via the
17 "Stipulation of Parties Re: Settlement of Complaint to Determine
18 Nondischargeability and Order Thereon." (Stipulation Order).

19 The Settlement Agreement provides in relevant part:

20 -- that one of the disputes resolved thereby is Adv. Proc.
21 No. 97-90390 (¶ I.A.);

22 - that the Debtors (with their wholly owned salons Bravo
23 Hair Design, Inc., DFW Hair LLC, and Salon Group, Inc.) will pay
24 to Plaintiff \$360,000.00, in monthly installments of \$7,500.00
25 beginning May 10, 2001 (¶ II.1.);

26 ///

1 - that the Debtors will pay an additional \$55,000.00 prior
2 to May 10, 2005 (§ II.1.); and

3 - that in the event of default the entire amount would
4 become due and payable. § II.3.

5 The Settlement Agreement also provided that the \$360,000.00
6 debt would be nondischargeable:

7 Non-dischargeability of Obligation. The monthly
8 installment payments totaling \$360,000 of Alfredo
9 Dinunzio and Rosanna Dinunzio provided in this
10 agreement have not and will not be discharged by any
11 bankruptcy petition or proceeding of Alfredo Dinunzio
12 and Rosanna Dinunzio, or Bravo Hair Design, Inc.,
13 including the proceedings pending in the United States
14 Bankruptcy Court for the Southern District of
15 California known as Case No. 97-02797 B11 (Dinunzio)
16 and 97-02795 (Bravo). In furtherance of this
17 agreement, Alfredo Dinunzio and Rosanna Dinunzio and
18 Bravo Hair Design, Inc. will sign and submit to the
court a stipulation regarding the non-dischargeability
of their obligations as provided in this agreement and
cooperate through their counsel to obtain an order from
the United States Bankruptcy Court that the obligations
provided by this agreement have not and will not be
discharged pursuant to bankruptcy laws of the United
States. If Bankruptcy Court approval of this agreement
is required by law, or any party to this agreement
requests Bankruptcy Court approval, the parties will
also seek such approval and cooperate with one another
in doing so.

19 Settlement Agreement § II.5.

20 Debtors made one or two payments under the Settlement
21 Agreement (\$10,000.00) but quickly defaulted.

22 On September 29, 2004, Plaintiff commenced an action in
23 San Diego Superior Court seeking judgment on the Settlement
24 Agreement. On May 27, 2005, judgment was entered in favor of
25 Plaintiff in the amount of \$525,403.56, representing the amounts
26 owing under the Settlement Agreement plus pre-judgment interest

1 as of May 27, 2005. (State Court Judgment). However, earlier on
2 that same day the Debtors had filed the petition commencing the
3 present bankruptcy case.

4 On August 15, 2005, Plaintiff filed a new complaint to have
5 the debts determined excepted from discharge.

6 Plaintiff brought this motion for summary judgment seeking a
7 ruling that the debt, as liquidated in the State Court Judgment,
8 is nondischargeable under Bankruptcy Code § 523(a)(10) because it
9 was determined to be non-dischargeable in the Prior Case. In
10 their opposition Debtors contend that there was no determination
11 that the debt was nondischargeable in the Prior Case. Debtors
12 also seek sanctions against Plaintiff for its violation of the
13 automatic stay in obtaining the State Court Judgment after the
14 petition was filed and its reliance thereon in connection with
15 this motion.

16 At the hearing the Court referred the parties to In re
17 Moncur, 328 B.R. 183 (9th Cir. BAP 2005), a case which neither
18 had cited. The Court heard argument and then gave the parties an
19 opportunity to file supplemental brief on the applicability of
20 the Moncur case. Plaintiff filed a supplemental brief, and the
21 Court thereafter took the matter under submission.

22 23 DISCUSSION

24 **Nondischargeability of the Debt**

25 Plaintiff's motion has a couple of problems. First,
26 Plaintiff cites to and relies upon § 523(a)(10) which provides:

1 (a) A discharge under section 727, 1141, 1228(a),
2 1228(b), or 1328(b) of this title does not discharge an
3 individual debtor from any debt-
4 (10) that was or could have been listed or scheduled by
5 the debtor in a prior case concerning the debtor under
6 this title or under the Bankruptcy Act in which the
7 debtor waived discharge, or was denied a discharge
8 under section 727(a)(2), (3), (4), (5), (6), or (7) of
9 this title, or under section 14c(1), (2), (3), (4),
10 (6), or (7) of such Act . . .

11 The problem is that there is neither evidence nor even argument
12 that the Debtors "waived discharge, or [were] denied a discharge
13 under section 727" in the Prior Case. The fact is that an order
14 granting the Debtors' discharge in the Prior Case was entered on
15 December 4, 1998. Section 523(a)(10) simply does not apply to
16 the facts of this case. See In re Garcia, 313 B.R. 307, 309 n.6
17 (9th Cir. BAP 2004) ("Section 523(a)(10) is inapplicable here, as
18 Debtors did receive their discharge in the 1993 California
19 bankruptcy.")

20 However, while § 523(a)(10) does not afford Plaintiff the
21 relief sought, § 523(b) does. Moncur, 328 B.R. at 186. In
22 Moncur the debtors had stipulated to a money judgment excepted
23 from discharge in a chapter 12 case in favor of creditor
24 Agricredit. Debtors filed a subsequent chapter 7 case and
25 obtained a discharge. Agricredit did not file an adversary
26 proceeding in the second case. Nevertheless, the Panel upheld
the bankruptcy court's ruling that the debt remained
nondischargeable in the second and any other subsequent case:

Section 523(b) indirectly acknowledges that, except for
the several exceptions stated therein, the general rule
is that if a particular debt is determined to be

1 nondischargeable in a valid and final judgment by a
2 court with jurisdiction and from which there was an
3 opportunity to appeal, then the debt is always
4 nondischargeable on the basis determined in the
5 judgment. Paine, 283 B.R. at 37-38. In other words:
6 once nondischargeable, always nondischargeable.

7 In re Moncur, 328 B.R. at 186. As stated above, in the Prior
8 Case the Court did order that the specific debt to Plaintiff was
9 nondischargeable. The Settlement Agreement resolved Plaintiff's
10 nondischargeability adversary proceeding. The Settlement
11 Agreement specifically provided that the payments totaling
12 \$360,000 called for in the Settlement Agreement "have not and
13 will not be discharged by any bankruptcy petition or proceeding
14 of [Debtors] including the [prior case] . . ."

15 Debtors admit entering into the Settlement Agreement, but
16 contend that there was no adjudication of nondischargeability in
17 the Prior Case because the Stipulation Order "does not provide
18 for nondischargeability." The Court disagrees. The Settlement
19 Agreement clearly provided that the \$360,000 debt would be
20 nondischargeable. The Stipulation Order provided that the "terms
21 and conditions of the parties' settlement are set forth in detail
22 in the fully executed Settlement Agreement and Release of All
23 Claims attached hereto . . .". Debtors have provided no
24 authority for the implicit proposition that a specifically worded
25 judgment is necessary. The cases the Court has reviewed indicate
26 that no special wording is required. In Garcia the Panel held
that a default judgment in a nondischargeability action was
entitled to preclusive effect even though it did not specifically

1 state that the claim was nondischargeable. Id. at 312-13. There
2 is also no requirement that the issue have been litigated in the
3 Prior Case. As noted above, as in this case, the order in Moncur
4 was based upon a stipulation. The Court finds that there was
5 clearly a finding of nondischargeability in the Prior Case.

6 Accordingly, under § 523(b) Plaintiff is entitled to a
7 judgment that some portion of the debt is nondischargeable in
8 this case.

9 The foregoing brings us to the second problem with
10 Plaintiff's motion. Plaintiff seeks a judgment that "the debt
11 owed by [Debtors] to [Plaintiff] in the sum of \$523,403.56 is
12 non-dischargeable." Motion at 4:20-21. The amount of the debt
13 claimed by Plaintiff is based on the State Court Judgment.
14 However, as noted above, the State Court Judgment was entered
15 after the petition was filed. It is thus void ab initio. In re
16 Schwartz, 954 F.2d 569, 571 (9th Cir. 1992). The amount of the
17 debt based upon the Settlement Agreement and order thereon
18 remains to be liquidated. The Court also notes that based
19 upon the Settlement Agreement, not all of the claim appears to
20 be nondischargeable. The Settlement Agreement provides only
21 that the "[t]he monthly installment payments totaling \$360,000.00
22 of Alfredo Dinunzio and Rosanna Dinunzio provided in this
23 agreement have not and will not be discharged" The
24 nondischargeability order does not appear to reach the additional
25 \$55,000.00 to be paid by the Debtors under the Settlement
26 Agreement. It is not clear from the record whether the amount of

1 the State Court Judgment is based on only the \$360,000.00 or also
2 includes the \$55,000.00. This, too, will have to be resolved.

3

4 **Sanctions for State Court Judgment**

5 This leaves us with Debtors' request for sanctions for
6 Plaintiff's violation of the automatic stay in obtaining the
7 State Court Judgment under Bankruptcy Code § 362(k) (formerly
8 (h)) and for relying on the State Court Judgment in the
9 declaration of Walter Chung in support of the motion for
10 summary judgment under Rule 56(g) of the Federal Rules of Civil
11 Procedure (made applicable to this adversary proceeding by
12 Fed.R.Bankr.Proc. 7056.)

13 As the Court explained at the hearing, sanctions under
14 § 362(k) must be sought in a separately noticed motion. See
15 Fed.R.Bankr.Proc. 9014 and 9020. Counsel sought to avoid the
16 requirement of a separately noticed motion by arguing that
17 authority for sanctions could also be found in Rule 56(g) which
18 provides:

19 (g) Affidavits Made in Bad Faith. Should it appear to
20 the satisfaction of the court at any time that any of
21 the affidavits presented pursuant to this rule are
22 presented in bad faith or solely for the purpose of
23 delay, the court shall forthwith order the party
24 employing them to pay to the other party the amount of
the reasonable expenses which the filing of the
affidavits caused the other party to incur, including
reasonable attorney's fees, and any offending party or
attorney may be adjudged guilty of contempt.

25 FRCP Rule 56. The first question under this Rule is whether the
26 Court finds that Plaintiff submitted an affidavit in bad faith.

1 The only affidavit submitted by Plaintiff in support of its
2 motion for summary judgment is the declaration of Walter Chung.
3 The declaration does attach the State Court Judgment and provides
4 "[s]aid Judgment was filed May 27, 2005. There having been no
5 appeal taken to this order, it is now a final order under
6 California law." Chung Dec. at ¶ 12. This is not only an
7 inaccurate statement of the facts and the law -- as noted above
8 the State Court Judgment was void ab initio -- but it is also a
9 statement Plaintiff and Plaintiff's counsel knew or should have
10 known to be inaccurate. Nearly a year earlier, on June 7, 2005,
11 counsel for the Debtors sent a letter to Mr. Chung explaining
12 that the State Court Judgment had been obtained after the
13 petition was filed, that it was void under federal bankruptcy
14 law, and that it was incumbent upon him to take steps to cancel
15 the judgment. Those were all accurate statements of the law and
16 counsel should have, at the very least, ceased to rely on the
17 State Court Judgment. Thus, the Court does find that to the
18 extent the Chung declaration relies on the State Court Judgment
19 it was filed in bad faith. The next question is whether and to
20 what extent an award of sanctions is appropriate.

21 An award of damages under Rule 56(g) is limited by its terms
22 to "the amount of the reasonable expenses which the filing of the
23 affidavits caused the other party to incur" Counsel for
24 the Debtors provided no evidence of any costs incurred due to
25 Plaintiff's reliance on the State Court Judgment in connection
26 with the motion for summary judgment. Debtors simply seek

1 "attorney's fees for opposing this Motion, plus punitive damages
2" Clearly punitive damages are not available under Rule
3 56(g). The Court has reviewed the opposition and determines
4 that any fees incurred as a result of Plaintiff's reliance on the
5 void State Court Judgement in connection with the motion for
6 summary judgment are negligible. The opposition does include a
7 discussion of the voidness of the judgment and the availability
8 of sanctions under § 362(h) and 56(g). However, counsel for the
9 Debtors had done that research and drafted that identical
10 language before the Chung declaration was even filed. Compare
11 Cawdry Letter dated June 7, 2005 with the Opposition 5:15-6:26.
12 All that was required of counsel for the Debtors was a simple cut
13 and paste.

14 Accordingly, while the Court finds that the Chung
15 declaration was filed in bad faith, no actual damages, as
16 required under Rule 56(g), resulted.

17 CONCLUSION

18 Plaintiff's motion for summary judgment is granted to this
19 extent - that portion of its claim which was stipulated to being
20 nondischargeable under the Settlement Agreement remains
21 nondischargeable in this case.

22 Debtors' motion for sanctions under § 362(k) is denied as it
23 must be brought by separately noticed motion. Debtors' motion
24 for sanctions under Rule 56(g) is denied as the Court finds no
25 evidence that any violation thereof resulted in any actual
26 damages.

1 The amount of Plaintiffs' nondischargeable claim remains to
2 be resolved. The parties will be notified of a status
3 conference.

4 IT IS SO ORDERED.

5 DATED: JUN 30 2006

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PETER W. BOWIE, Chief Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re Adversary Case No. 05-90358-B7
Bankruptcy Case No. 05-04824-B7

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

ORDER ON MOTION FOR
SUMMARY JUDGMENT

was enclosed in a sealed envelope bearing the lawful frank of the Bankruptcy Judges and mailed to each of the parties at their respective address listed below:

Attorneys for Plaintiff:

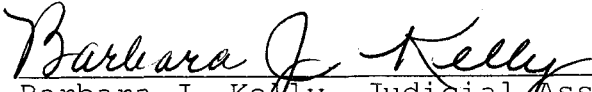
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Said envelope(s) containing such document were deposited by me in a regular United States mail box in the City of San Diego, in said district on June 30, 2006.


Barbara J. Kelly, Judicial Assistant